Supreme Court, U.S.
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No. 00-346

IN THE

# Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

*Petitioner,*

*v.*

CELESTINE GARRIS, Administratrix of the Estate of CHRISTOPHER GARRIS, Deceased,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Is there a general maritime cause of action for wrongful death that includes liability premised on negligence?

## LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this case except E.T. Gresham, Inc. ("Gresham"). Gresham was originally named as a co-defendant in this action and it participated in the proceedings before the United States Court of Appeals for the Fourth Circuit. Upon motion of Celestine Garris, the Court of Appeals entered an order dismissing Gresham from the action, with prejudice, on May 1, 2000.

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## STATEMENT OF THE CASE

In April of 1997, Christopher Garris ("Garris"), age 21, (the son of Respondent, Celestine Garris) was employed by Tidewater Temps, Inc. and was working for Mid-Atlantic Coatings ("Mid-Atlantic"), a company in the business of sandblasting and cleaning ships' hulls and holds. On the night of April 8, 1997, Christopher Garris was working on board the USNS MAJ. STEPHEN W. PLESS at Pier 11 at the Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), while the vessel was berthed in the navigable waters of the United States. On that night, Mid-Atlantic, was working pursuant to a contract with NORSHIPCO for repairs to the ship. At approximately 10:20 p.m., Garris was asked by his supervisor to climb to the top of a reserve sand hopper silo, a structure approximately thirty feet above the deck of the ship that held and funneled sand for use in sandblasting operations. The silo needed to be refilled with sand and a crane was used to raise a container full of sand up to the silo. Once atop the reserve silo, Garris was to throw a hand operated lever on the container that would allow the sand to flow out of the container and into the silo. As a result of a poor communication signaling system as directed by NORSHIPCO, and as a result of the negligence of a crane operator, Garris was knocked off the silo by the crane and he fell to his death on the deck of the ship.

Because Garris was engaged in maritime employment and was working on navigable waters, he was covered by the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* (LHWCA), and consequently, his parents received certain funeral expense benefits. While the LHWCA § 905(b) specifically provides for an employee's

cause of action against "a vessel", this is not such a case, but instead is an action against other contractors working aboard the USNS MAJ. STEPHEN W. PLESS. Garris has no statutory cause of action under the LHWCA against NORSHIPCO.

Celestine Garris brought suit in the United States District Court for the Eastern District of Virginia against NORSHIPCO and E.T. Gresham, Inc. ("Gresham") (whose employee was operating the crane) seeking recovery for the wrongful death of her son based upon negligence under general maritime law and the Virginia wrongful death statute, Va. Code § 8.01-50. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

The district court's dismissal of the wrongful death negligence action under general maritime law was based on its conclusion that *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) did not create a general maritime cause of action for wrongful death based on negligence. The Fourth Circuit agreed, but nonetheless reversed the district court's dismissal after deciding to extend *Moragne* to recognize such a cause of action explaining that "[b]ecause the creation of a negligence-based wrongful death action is consistent with the principles of uniformity and consistency that formed the basis for *Moragne*, and because Congress has not

1. The district court dismissed with prejudice the general maritime law wrongful death claim. The district court did not exercise supplemental jurisdiction over the state wrongful death action and dismissed the state law claim without prejudice. Celestine Garris thereafter filed the state wrongful death action in Virginia state court only against Gresham. That action has since been dismissed by the state court on the ground that Gresham's crane operator was the "borrowed servant" of NORSHIPCO.

affirmatively precluded a negligence-based wrongful death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence." *Garris v. Norfolk Shipbuilding & Drydock Company, Inc.*, 210 F.3d 209 at 211 (4th Cir. 2000). In a concurring opinion a member of the panel agreed with the judgment but argued that *Moragne* need not be extended in order to create such a cause of action because "*Moragne* itself created a cause of action for negligence-based wrongful death." *Id.* at 223 (Hall, J., concurring).

## REASONS FOR DENYING THE WRIT

### A. The "Three-Way split" which the Petitioner claims exists in the Federal Courts of Appeal is, for practical purposes, at most a two-way split and may actually be no split at all

NORSHIPCO contends that certiorari should be granted in order to resolve a three-way split among the Federal Courts of Appeal as to whether *Moragne* created a general maritime cause of action for negligence-based wrongful death. NORSHIPCO argues that the Fifth and Eleventh Circuits (and the Virginia Supreme Court) have held that no such cause of action was created by *Moragne* and that *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness. On the other hand, the Second and Fifth Circuits[2] (and the Texas Supreme

2. In *Ivy v. Security Barge Lines*, 606 F.2d 524, 527 (1979), the Fifth Circuit, sitting en banc, held that Moragne only created a general maritime cause of action for wrongful death based on unseaworthiness. The most recent decision from the Fifth Circuit on this issue is *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d

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Court[3]) have held that *Moragne* created a wrongful death cause of action premised on both negligence and unseaworthiness. The Fourth and Ninth Circuits have held that while *Moragne* only recognized a general maritime cause of action for wrongful death based on unseaworthiness, *Moragne* should be extended so as to recognize a negligence-based wrongful death action under general maritime law. Putting aside the Fifth Circuit for the moment, this "three-way split" is in reality at most a "two-way split" in that the Second, Fourth and Ninth Circuits (and the Texas Supreme Court) recognize a general maritime negligence-based cause of action for wrongful death and only the Eleventh Circuit (and the Virginia Supreme Court) do not. Whether the Second, Fourth and Ninth Circuits (and the Texas Supreme Court) arrive at their conclusion by extending *Moragne* or by simply applying *Moragne*, the result is the same.

Upon closer inspection, even the Eleventh Circuit's opinion does not support an argument that there is a true split among the Circuits. As the concurring opinion in *Garris* explained, in *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982), the Eleventh Circuit held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." In *Ford* the court held that "at least where statutory remedies exist, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss

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1084 (1993), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), in which the court held, without reference to *Ivy*, that *Moragne* created a general maritime cause of action for wrongful death based on negligence.

3. *See General Chemical Corporation v. De La Lastra*, 852 S.W.2d 915 (Tex. S. Ct. 1993), *cert. dismissed*, 510 U.S. 985 (1993).

of uniformity." *Ford* at 716. Unlike the present case, in *Ford* DOHSA provided a statutory cause of action and remedies to the plaintiff.

Respondent does not agree that the Fifth Circuit's position on this issue is unsettled. The Fifth Circuit has most recently held that *Moragne* "recognized a wrongful death action for negligence and unseaworthiness under general maritime law." *See Miles v. Melrose*, 882 F.2d 976, 985 (1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). This Court's opinion upholding the Fifth Circuit's decision in *Miles*, while not expressly addressing the above-quoted sentence in the Fifth Circuit's opinion, strongly supports the conclusion that the wrongful death action recognized in *Moragne* is not limited to liability premised on unseaworthiness.

First, liability in *Miles* was premised on both negligence and unseaworthiness. *Miles*, 882 F.2d at 980. Second, in *Miles*, this Court rejected a similar attempt to limit the reach of *Moragne*.[4] *Miles*, 498 U.S. at 27. Third, this Court's affirmance in *Miles* pointed to the unanimous enactment of state wrongful death statutes, The Jones Act and the The Death on the High Seas Act (all of which include negligence as a theory of liability) as having "established an unambiguous policy in abrogation of those principals that underlay *The Harrisburg* [which denied a general maritime wrongful death claim premised on negligence].[5] Such a policy is 'to be given its appropriate weight

4. In *Miles* the defendant, Apex, argued that *Moragne*'s holding, creating a general maritime wrongful death action, did not apply because the plaintiff, Torregeno, was a true seaman whereas *Moragne* was a longshoreman. This Court stated "Apex is correct that *Moragne* does not apply on its facts, but we decline to limit *Moragne* to its facts." *Miles*, 498 U.S. at 27.

5. *The Harrisburg*, 119 U.S. 199 (1886).

not only in matters of statutory construction but also in those of decisional law.' " *Miles*, 498 U.S. at 23-24 (quoting *Moragne* at 391). The *Miles* Court went on to say that "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action." *Id.* at 24. This Court's opinion in *Miles* said nothing that would even hint that the general maritime wrongful death action recognized in *Moragne*, reaffirmed in *Miles*, and which embodied the "unanimous legislative judgment" of state and federal legislatures recognizing negligence-based wrongful death recoveries, was to be limited only to actions premised on the theory of unseaworthiness. *See also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214 n.11 (1996) ("While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is for 'death caused by violation of maritime duties.' ").

Respondent contends that in light of *Miles* (and *Yamaha*), the decision in *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979) is no longer good law even in the Fifth Circuit to the extent it can be read as restricting the wrongful death action to liability premised on unseaworthiness. Moreover, as the concurring opinion in *Garris* points out, the majority opinion in *Ivy* was premised on a concern that the plaintiff might obtain inconsistent double recoveries for the same injury under *Moragne* and the Jones Act. No such concern exists in this case as Garris has no wrongful death action available under the LHWCA and possibly no action under the Virginia wrongful death statute. Under *Yamaha*, apparently only "non-seafarers" are permitted the application of the state law of the waters in which the accident occurred. Justice Ginsberg stated:

> Traditionally, state remedies have been applied in accident cases of this order — maritime wrongful death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade. We hold . . . that state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful death action recognized in *Moragne*.

*Yamaha* at 202. *See Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1058-60 (9th Cir. 1997) (finding that marine surveyor killed aboard a ship was a "seafarer" within the meaning of *Yamaha* and holding that therefore state wrongful death remedies were preempted by federal maritime law). *See also Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 1997 AMC 1546 (1997) (following *Yamaha*, state wrongful death statutes are available only when decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade).

We are then left with Virginia state courts as the only jurisdiction which unambiguously limits *Moragne*'s general maritime action for wrongful death to the maritime duty of unseaworthiness. *See Brown v. Brown*, 309 S.E.2d 586 (1983), *cert. denied*, 467 U.S. 1242 (1984). As detailed above, the decisional landscape has changed dramatically in the seventeen years since *Brown* was decided. The *Brown* decision relied on the Fifth Circuit's decision in *Ivy* and the Eleventh Circuit's decision in *Ford v. Wooten*, 681 F.2d 712, 717 (11th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983). Both cases are of dubious continuing vitality in light of more recent contrary authority, including the Fifth Circuit's change

of position in *Miles* and this Court's decisions in *Miles* and *Yamaha*. Moreover, the *Brown* Court was apparently unaware of the Ninth Circuit's decision in *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). Respondent is confident that when the Virginia Supreme Court is presented with the question again, it will follow the overwhelming authority (most of which has been decided since *Brown* and which now includes the Fourth Circuit) which recognizes a general maritime wrongful death cause of action premised on negligence.

**B. This Court has already determined the existence of a negligence-based wrongful death action under general maritime law**

It is the position of respondent that this Court in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996) has already answered in the affirmative the question of whether there is a general maritime negligence-based wrongful death action. In *Yamaha*, a twelve-year-old was killed in a jet ski accident at a beach in Puerto Rico. Her parents brought a negligence-based wrongful death action under state law against the jet ski manufacturer. The jet ski manufacturer argued that because the accident occurred on navigable waters, state remedies were displaced by the federal maritime wrongful death action recognized in *Moragne*. This Court disagreed holding that the federal maritime claim for wrongful death recognized in *Moragne* does not supply the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters. Essential to the discussion and holding in *Yamaha* is the existence of a general negligence-based wrongful death action which might arguably displace state law remedies. If no such cause of action exists under general maritime law

as NORSHIPCO contends, then the *Yamaha* litigation and this Court's opinion were much ado about nothing. In effect, NORSHIPCO argues that *Yamaha* stands for nothing because the federal claim that the Court found did not preempt state law remedies does not exist to begin with.

No court or commentator writing after the *Yamaha* opinion was handed down has agreed with NORSHIPCO's argument. *See* Steven F. Friedell, Searching for a Compass: Federal and State Law Making Authority in Admiralty, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence."). In fact, as pointed out in the concurring opinion in *Garris*, the *Yamaha* Court cited with approval Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* at 368 (2d ed. 1974) where the authors concluded that the *Moragne* remedy "provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness."

### C. Petitioner's remaining arguments based on federalism and separation of powers are unpersuasive

NORSHIPCO argues that important issues of federalism and separation of powers are implicated in its appeal. With regard to the issue of federalism, NORSHIPCO contends that recognition of a negligence-based general maritime wrongful death action will somehow undermine state wrongful death statutes.[6] Just the opposite is true. *Moragne* sought to give effect

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6. NORSHIPCO's federalism concerns and arguments concerning uniformity (Petition for Writ at pp. 12-14) assume (Cont'd)

to the policies underlying the enactment of state wrongful death actions. In *Miles*, this Court recognized this goal of *Moragne* when it stated "the unanimous legislative judgment behind the Jones Act, DOSHA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death statute." *Miles* at 24.

Due to principles of uniformity and consistency necessary to the administration of federal maritime law, some minor inconsistencies will no doubt exist concerning the specifics of state wrongful death statutes and a general maritime wrongful death action. However, the overriding state policy of permitting a negligence-based cause of action for wrongful death is promoted by recognizing a general maritime negligence-based cause of action for wrongful death. If a general maritime cause of action for wrongful death is not available under the facts of this case, the clear and longstanding public policy of Virginia will be thwarted because the state wrongful death statute may not be available to Garris in the wake of *Yamaha*.

Petitioner's dire warnings concerning "separation of powers" also do not hold up upon inspection. There is nothing in the LHWCA which purports to limit a longshoreman or

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Virginia's wrongful death statute is or was available to Respondent. However, NORSHIPCO's counsel successfully argued in *Goose Creek Trawlers, Inc., Limitation Proceedings F/V Haley Clark*, 1997 AMC 1546 (1997) that, following *Yamaha*, state wrongful death statutes are only available to nonseafarers who are killed in navigable waters. It appears clear that Garris is a "seafarer" as defined by *Yamaha* as he was "a person otherwise engaged in maritime trade" and he was covered by the LHWCA. *See Yamaha*, 516 U.S. at 201 and 205 n.2.

harbor worker's rights against anyone except his employer and the vessel owner.[7] If, as NORSHIPCO suggests, such a limit was intended by Congress it certainly would have included it in the statute. "The LHWCA does not require a claimant to elect between statutory compensation and tort recovery. She can both accept compensation and file a civil action against a third party tortfeasor." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd ed., Vol. 1 at 434. Petitioner's separation of powers argument is a frontal attack on *Moragne,* for even under NORSHIPCO's stingy reading of the case, *Moragne* was filling legislative gaps by judicial decision-making. *Moragne* at 391.

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7. When the LHWCA was passed in 1927, it created a no-fault compensation scheme for longshoreman and harbor workers and their employers. It also codified a cause of action for negligence by such workers against vessel owners. *See* 33 U.S.C. § 905(b). Later, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court extended the warranty of seaworthiness to longshoreman who were aboard a ship doing seaman's work. Then, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) the Supreme Court found an implied warranty of workmanlike performance running from the stevedore to the vessel owner. This set off a "liability 'round robin' whereby an injured longshoreman could recover damages for unseaworthiness from the shipowner who in turn could recover against the longshoreman for breach of the implied warranty of workmanlike performance." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd ed., Vol. 1 at 434. The 1972 amendments to the LHWCA sought to eliminate this problem by abolishing the *Sieracki* cause of action for unseaworthiness against vessel owners and the indemnity action created by *Ryan* in favor of vessel owners. The 1972 amendments did not address the liability of non-vessel third parties because they were not part of the problem Congress sought to correct.

## CONCLUSION

Based on the clear weight of recent authority recognizing a general maritime cause of action for negligence-based wrongful death arising out of *Moragne*, including this Court's opinion in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), respondent believes that the issue requires no further clarification at this time. It is respectfully suggested that until such time as a lower court decision is handed down which ignores this recent precedent and holds that the *Moragne* cause of action is limited to unseaworthiness, there is no need to clarify the issue because there is no split among the circuits or confusion to clarify.

Respectfully submitted,

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